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In the Supreme Court of the United States

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,

Petitioner,

v.

WAFFLE HOUSE, INCORPORATED,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF *AMICUS CURIAE* OF LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, NATIONAL PARTNERSHIP FOR WOMEN & FAMILIES, NATIONAL ASIAN PACIFIC AMERICAN LEGAL CONSORTIUM, NOW LEGAL DEFENSE FUND, AND NATIONAL WOMEN'S LAW CENTER IN SUPPORT OF PETITIONER EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

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QUESTION PRESENTED

Whether the existence of a mandatory, pre-dispute workplace arbitration policy leaves intact the authority of the EEOC to pursue individual remedies for employees through litigation under 42 U.S.C. § 2000e-5(f)(1) and (g)(1), 42 U.S.C. § 1981a(a)(1) and (d), and 29 U.S.C. § 626(b).

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INTEREST OF *AMICUS CURIAE*[1]

The Lawyers' Committee for Civil Rights Under Law is a tax-exempt, nonprofit civil rights legal organization founded in 1963 by the leaders of the American bar at the request of President Kennedy, to provide legal representation to the victims of civil rights violations. Its members include former Attorneys General, former Assistant Attorneys General for the Civil Rights Division of the Justice Department, former Chairs of the Equal Employment Opportunity Commission, former Secretaries of Cabinet Departments, law school deans and professors, and many of the nation's leading lawyers. Over the last 38 years, the Lawyers' Committee and its local affiliates in Boston, Chicago, Denver, Los Angeles, Philadelphia, San Antonio, San Francisco, and Washington have represented members of minority groups and women in hundreds of civil rights cases.

The National Asian Pacific American Legal Consortium (NAPALC) is a national non-profit, non-partisan organization whose mission is to advance the legal and civil rights of Asian Pacific Americans. Collectively, NAPALC and its Affiliates, the Asian American Legal Defense and Education Fund, the Asian Law Caucus and the Asian Pacific American Legal Center of Southern California, have over 50 years of experience in providing legal public policy, advocacy, and community education on discrimination issues. NAPALC has a deep and abid-

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[1] The position amici take in this brief has not been approved or financed by petitioner or his counsel. No counsel for any party had any role in authoring this brief. The written consents of both parties have been filed with the Clerk of the Court pursuant to Supreme Court Rule 37.3(a).

ing interest in ensuring the ability of the EEOC to enforce an action on behalf of an individual under the law.

The National Partnership for Women & Families (National Partnership) is a national advocacy organization that develops and promotes policies to help women achieve equal opportunity, quality health care, and economic security for themselves and their families. Since its founding in 1971, the National Partnership (formerly the Women's Legal Defense Fund) has worked to advance equal employment opportunities by monitoring agencies' EEO enforcement, challenging employment discrimination in the courts, and leading efforts to promote employment policies such as the Family and Medical Leave Act and the Pregnancy Discrimination Act.

NOW Legal Defense and Education Fund ("NOW Legal Defense") is a leading national non-profit civil rights organization that uses the power of the law to define and defend women's rights. A major goal of NOW Legal Defense is the elimination of barriers that deny women economic opportunities, such as employment discrimination. In furtherance of that goal, NOW Legal Defense litigates cases to secure full enforcement of laws prohibiting employment discrimination, including *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) and *Bowman v. Heller*, 420 Mass. 517 (Mass.), *cert. denied*, 516 U.S. 1032 (1995). NOW Legal Defense participated as *amicus* in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998); *Oncale v. Sundowner Offshore Services*, 523 U.S. 75 (1998); *Harris v. Forklift Sys. Inc.*, 510 U.S. 17 (1993); and *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994). NOW Legal Defense has also participated as *amicus* in numerous cases challenging mandatory arbitration, including *Circuit City Stores, Inc. v. Adams*, 121 S. Ct. 1302 (2001); *Wright v. Universal Maritime Serv. Corp.*,

525 U.S. 70 (1998) and *Rosenberg v. Merrill Lynch*, 170 F.3d 1 (1st Cir. 1999).

The National Women's Law Center (NWLC) is a nonprofit legal advocacy organization dedicated to the advancement and protection of women's rights and the corresponding elimination of sex discrimination from all facets of American life. since 1972, NWLC has worked to secure equal opportunity for women in education, the workplace, and other settings, including through litigation of cases brought under national, state, and local antidiscrimination laws. The Center has a deep and abiding interest in ensuring that these laws are fully implemented and enforced.

INTRODUCTION

In June of 1994, Eric Scott Baker seated himself at a Waffle House booth in Columbia, South Carolina and—as a precondition to seeking a $5.50 an hour job as a grill operator—signed a job application that consigned "any dispute or claim concerning Applicant's employment" to "binding arbitration." When the EEOC later sought to litigate a challenge to Mr. Baker's termination under the Americans with Disabilities Act of 1990 ("ADA"), 42 U.S.C. § 12101 *et seq.*, it was met with this application as an absolute bar to proceedings to obtain an individual remedy for Mr. Baker.

This year, the Court held that the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*, governs arbitration of contracts of employment in interstate commerce, other than those excluded by Section 1 covering "only contracts of employment of transportation workers." *Circuit City Stores, Inc. v. Adams*, 121 S. Ct. 1302, 1311 (2001).

The Court accepted this case to decide whether the existence of a mandatory, pre-dispute workplace arbitration policy governed by the FAA forestalls EEOC enforcement authority under 42 U.S.C. § 2000e-5(f)(1) and (g)(1); 42 U.S.C. § 1981a(a) and (d); and 29 U.S.C. § 626(b).[2] The issue is whether Mr. Baker, by applying to work at Waffle House, relinquished all rights save for those that he could vindicate through arbitration—including the government's independent authority to obtain an individual remedy for him in a judicial forum.[3]

The realm of private ordering does not stretch as far as Waffle House would argue here.[4] Private arbitration

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[2] Notably, this case does *not* present the issue of the claim preclusive effect of an arbitration award, because Mr. Baker never arbitrated his claim under Waffle House's policy. It is uncertain whether arbitration awards have a preclusive effect on litigation in federal court. *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 222 (1985). It is anomalous, given the uncertainty on this point, why the mere *existence* of an arbitration policy should therefore preclude federal litigation.

[3] This appeal proceeds on the EEOC's concession, for purposes of this appeal, that Mr. Baker's assent to arbitration with Waffle House is presumptively valid. *Amici* nonetheless find considerable merit in the dissenting opinion of Judge King, which concluded that the district court did not clearly err in holding that there was no agreement to arbitrate between Mr. Baker and the respondent in this case (because Mr. Baker was not required to resubmit himself to arbitration when he applied for a second time to work at a different Waffle House location). *EEOC v. Waffle House, Inc.*, 193 F.3d 805, 813-18 (4th Cir. 1999) (King, J., dissenting), *cert. granted*, 121 S. Ct. 1401 (2001).

[4] *NLRB v. Int'l Longshoremen's Ass'n, AFL-CIO*, 473 U.S. 61, 90 (1985) ("if private ordering were sufficient to alleviate all

(continued...)

policies under the FAA do not abrogate EEOC-initiated employment actions to obtain victim-specific relief. To hold otherwise would cross the line that this Court drew against prospective waivers of civil rights in *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 51 (1974). The employee would unwittingly lower the shield of the EEOC's enforcement powers. It would also not be "appropriate" under 42 U.S.C. § 12212 and section 118 of the Civil Rights Act, given that in the same legislation that authorized some forms of arbitration, Congress also conferred new authority upon the EEOC to seek individual remedies.

SUMMARY OF ARGUMENT

Section I shows how Congress has now twice empowered the EEOC in 1972 and 1991 to bring actions to obtain individual relief for employees. Section II shows why a mandatory, pre-dispute workplace arbitration policy—as a matter of statutory and contract law—cannot insulate an employer from an EEOC action for individual relief. *First*, foreclosing EEOC enforcement of the law through obtaining individual relief would be inconsistent with the statutory mechanism established by Congress. *Second*, the existence of a workplace arbitration policy may not abridge employees' rights prospectively to a remedy that may be conferred by the EEOC. *Third*, extending a mandatory, pre-dispute arbitration policy to the EEOC is not "appropriate" under 42 U.S.C. § 12212 or section 118 of the Civil Rights Act of 1991,

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[4] (...continued)
labor problems then there would be no need for labor laws") (Rehnquist, J., dissenting).

because Congressional approval of some forms of non-coersive alternative dispute resolution (including arbitration) came in the same act that expanded the EEOC's authority to seek legal relief under 42 U.S.C. § 1981a. *Fourth*, such a policy would be void under the common law contract defense of illegality—incorporated by reference in the FAA, 9 U.S.C. § 2—because it impairs government enforcement of public rights in derogation of public policy.

ARGUMENT

I. CONGRESS CHARGED THE EEOC TO BRING LITIGATION TO SECURE RELIEF FOR INDIVIDUALS AS AN IMPORTANT ELEMENT OF A CONCERTED ENFORCEMENT MECHANISM

In 1972, Congress recognized that litigation by individuals was an insufficient means by which to eliminate discrimination from the workplace. As this Court observed, previously "each individual victim of discrimination . . . [would] go into court as a private party, with the delay and expense that entails, in order to secure the rights promised him under the law." *General Tel. Co. of the Northwest, Inc. v. EEOC*, 446 U.S. 318, 326 n.7 (1980) (*quoting* S. Rep. No. 92-415, p. 4 (1971)). Individual employees may not have the facility or resources to seek out and retain a lawyer and bring litigation or, for that matter, an arbitration proceeding. Employees' claims may be too complex or difficult, the employers too small or the employees too unsophisticated to attract the private bar's attention.[5] Finally, only a public agency

[5] *See, e.g.*, William Tamayo, *The Role of the EEOC in Protecting the Civil Rights of Farm Workers*, 33 U.C. Davis. L. Rev. (continued...)

that reviews many complaints will have the perspective to cull cases for enforcement priority.[6]

Congress crafted a joint public/private mechanism for enforcing civil rights under Title VII, which includes (1) authorizing the EEOC to investigate and conciliate claims of discrimination, to interpret the law (42 U.S.C. §§ 2000e-5(b) and 2000e-12) and to litigate claims (*id.* § 2000e-5(f)(1)); (2) granting the Department of Justice enforcement authority against State and local governments (*id.* §§ 2000e-5(f)(1) and 2000e-6); and (3) allowing private lawsuits. Congress incorporated the same enforcement provisions by reference in the ADA, the statute at issue in the present case (*id.* § 12117).[7]

[5] (...continued)
1075, 1084 (2000) ("Given the imbalance of power between growers and farm workers, government can play a critical role in helping farm workers. Realistically, very few lawyers in the private bar will take on farm worker or other immigrant employment matters."); Julie Davies, *Federal Civil Rights Practice in the 1990's: The Dichotomy Between Reality And Theory*, 48 Hastings L. J. 197, 235 (1997) (survey of attorneys finds that "blue collar workers terminated from employment" have difficulty obtaining counsel).

[6] *See, e.g.*, Maurice E. R. Munroe, *The EEOC: Pattern and Practice Imperfect*, 13 Yale L. & Pol'y Rev. 219, 220 (1995) ("The EEOC . . . has both the resources and the responsibility to monitor employment practices and bring the strongest possible cases attacking discriminatory practices. The best way to attack discriminatory practices is to investigate and prosecute firms based on the use of statistical evidence. The EEOC not only has access to this type of data but also possesses the necessary investigatory powers and legal expertise.").

[7] Under the ADEA, Congress also authorized the EEOC to commence suit; the private right to bring an action termi- (continued...)

Indeed, Congress consistently has acted to extend and enhance the EEOC's enforcement role by means of seeking relief for individuals. Again, in 1991, Congress added powerfully to the EEOC's enforcement authority by conferring power upon it as a "complaining party" to seek individual legal remedies (including compensatory and punitive damages). 42 U.S.C. § 1981a(a) and (d). And in addition to federal agency responsibility for enforcing anti-discrimination laws by seeking individual relief, Congress took care to include and encourage civil rights enforcement by state anti-discrimination agencies.[8] *California Federal S. & L. Assn. v. Guerra*, 479 U.S. 272, 282-83 (1987) (noting "the importance Congress attached to state antidiscrimination laws in achieving Title VII's goal of equal employment opportunity"). Many states authorize government action (through judicial or administrative channels) to provide

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[7] (...continued)
nates when the EEOC files. 29 U.S.C. § 626(b) and (c)(1). Under the ADEA, "[n]o waiver agreement may affect the Commission's rights and responsibilities to enforce this chapter." 29 U.S.C. § 626(f)(4). This term expressly renders unenforceable any contract that purported to waive the Commission's authority to enforce the ADEA.

[8] *See* 42 U.S.C. § 2000e-5(b) to -5(f) (EEOC cooperation with State and local authorities); 42 U.S.C. § 2000e-7 ("[n]othing in this subchapter shall be deemed to exempt or relieve any person from any liability, duty, penalty, or punishment provided by any present or future law of any State or political subdivision of a State . . ."); 42 U.S.C. § 2000h-4 (disclaiming Congressional intent "to occupy the field in which any such title operates to the exclusion of State laws on the same subject matter").

individual remedies to aggrieved employees.[9] Thus, the ability of state agencies independently to seek relief for individuals who have suffered discrimination is an extension of the comprehensive enforcement mechanism Congress found necessary and desirable to combat the national problem of bias in the workplace.[10]

Congress has established as an essential feature of enforcement of non-discrimination laws the authority and ability of the EEOC (and corresponding state agencies) to obtain individual relief for victims. Thus, as discussed more fully in Argument II below, a rule that would foreclose the EEOC from obtaining relief for individuals in its cases by virtue of an agreement between private parties, entered in advance of any employment relationship, would alter that arrangement and impair its ability to enforce the law, and do so in a way not authorized or provided for by Congress. Further, the opportunity—indeed, incentive—for an individual to prompt enforcement of the law by the EEOC by filing an administrative charge, and thereby to obtain individual relief, is not only an absolutely essential requisite in the enforcement mechanism fashioned by Congress, but is a

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[9] *See, e.g.*, ARIZ. REV. STAT. § 41-1481(D); CAL. GOV'T CODE § 12965(a); COLO. REV. STAT. § 24-34-405; DEL. CODE, TIT. 19, § 712; HAW. REV. STAT. § 368-3; IDAHO CODE § 67-5908; IND. CODE § 22-9-1-6; MICH. COMP. LAWS § 37.2605; OHIO REV. CODE § 4112.05.

[10] The Court must take care in ruling in this case that it does not interfere with state administrative power to enforce civil rights, for such law may conceivably be preempted under *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984) and *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 272 (1995). *See Circuit City*, 121 S. Ct. at 1312-13 (discussing these cases).

substantive protection provided by Title VII and like statutes. A rule that would foreclose the EEOC from proceeding on a meritorious charge due to the existence of a mandatory, pre-dispute workplace arbitration policy, would seriously impair Congress's enforcement mechanism, both by preventing the EEOC from enforcing the law where it has uncovered employment discrimination, and by effectively removing any purpose or incentive for the filing of charges of discrimination—the source of information upon which the investigation and enforcement mechanism largely is based—by employees who believe they are bound by such policies.[11]

II. MANDATORY, PRE-DISPUTE ARBITRATION POLICIES DO NOT ABROGATE THE FEDERAL GOVERNMENT'S POWER TO OBTAIN RELIEF FOR EMPLOYEES WHO SUFFER DISCRIMINATION

The Solicitor General argues, and *amici* agree, that Congress conferred a statutory grant of authority upon the EEOC to seek individual relief in a judicial forum—

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[11] Aside from these civil rights statutes, Congress has often authorized combined public and private judicial enforcement of federal workplace laws; all of these arrangements may be implicated by this case. *See, e.g.*, 29 U.S.C. § 216(c) (Secretary of Labor can seek relief for employees under the FLSA); 29 U.S.C. § 1132(a) (Secretary can seek relief under ERISA); 29 U.S.C. § 1855(b) (Secretary can seek relief for retaliation against employees under the Migrant And Seasonal Agricultural Worker Protection Act); 29 U.S.C. § 2005(b) (Secretary can seek relief for employees under the Employee Polygraph Protection Act); 30 U.S.C. § 815(c)(2) (Secretary's action for anti-retaliation under Federal Mine Safety and Health Act); 38 U.S.C. § 4323(a) (Attorney General can bring action under Veterans' Reemployment Rights Act).

see generally *General Tel. Co.*, 446 U.S. at 324-26—and that individual employees lack sovereignty to submit such public authority to private arbitration. For four reasons, *amici* argue that a private arbitration policy cannot be interposed against the EEOC as it seeks relief for individual employees: (A) foreclosing EEOC enforcement of the law through obtaining individual relief would be inconsistent with the statutory mechanism mandated by Congress; (B) it would curtail employees' remedial rights prospectively, rather than effectively vindicate those rights; (C) it would not be "appropriate" under 42 U.S.C. § 12212 or Section 118 of the Civil Rights Act of 1991 because Congress linked its recognition of alternative dispute resolution with an expansion of the EEOC's authority to seek legal relief under 42 U.S.C. § 1981a; and (D) such a policy would be unenforceable under FAA, 9 U.S.C. § 2, to the extent that it impairs law enforcement efforts.

A. Foreclosing EEOC Enforcement of Anti-Discrimination Laws Through Obtaining Individual Relief by Virtue of the Existence of a Private Arbitration Policy Would Be Inconsistent with the Statutory Mechanism Established by Congress

Foreclosing EEOC enforcement of the law through obtaining individual relief would be inconsistent with the statutory mechanism established by Congress. An important component of the balance struck in *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991)—finding ADEA claims arbitrable under the FAA—was that EEOC enforcement would serve as a backstop to private arbitration policies. "An individual ADEA claimant subject to an arbitration agreement will still be free

to file a charge with the EEOC, even though the claimant is not able to institute a private judicial action." *Gilmer*, 500 U.S. at 28. Yet the Fourth Circuit's expanded view of the effect of a mandatory, pre-dispute arbitration policy as precluding the government from effectively enforcing the law through obtaining relief for individuals violates both the mechanism and methods of enforcement Congress has selected and this Court's clearly stated recognition of that enforcement mechanism in *Gilmer*. It would evicerate much of the remedial power that Congress conferred under 42 U.S.C. § 2000e-5(f)(1) and (g)(1); 42 U.S.C. § 1981a(a) and (d); and 29 U.S.C. § 626(b)—divesting the EEOC of any statutory authority to pursue individual remedies in the face of such a private policy.

The importance of having the EEOC exercise its full, undivided enforcement authority has been stressed by this Court. *See, e.g., EEOC v. Shell Oil Co.*, 466 U.S. 54, 62 (1984) ("[i]n its current form, Title VII sets forth 'an integrated, multistep enforcement procedure' that enables the Commission to detect and remedy instances of discrimination") (*quoting Occidental Life Insurance Co. v. EEOC*, 432 U.S. 335, 359 (1977)); *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416 (1975) (remedies available under Title VII constitute a "complex legislative design directed at an historical evil of national proportions").

As discussed in Argument I above, Congress expanded the EEOC's authority to seek individual remedies when, in 1991, it amended Title VII to allow the EEOC for the first time to pursue individual legal remedies (including compensatory and punitive damages) by defining the agency as a "complaining party." 42 U.S.C. § 1981a(a)(1) and (d). It was error for the court below to second-guess

Congress's judgment—regarding the importance of the government's authority to seek remedies for individuals who have suffered discrimination in securing enforcement of the laws—and determine that these additional powers were "less significant" than purely injunctive relief. *Compare EEOC v. Waffle House, Inc.*, 193 F.3d 805, 812 (4th Cir. 1999) (public interest in EEOC's enforcement of charging party's claim deemed "less significant" by panel majority than "an EEOC suit seeking large scale injunctive relief to attack discrimination more generally") *with EEOC v. Frank's Nursery & Crafts, Inc.*, 177 F.3d 448, 466 (6th Cir. 1999) ("[i]f Congress believed the EEOC could effectively eradicate employment discrimination through injunctive remedies alone, it would not have empowered the EEOC to obtain more"). Congress, having determined the means of government enforcement and weighed the respective benefits of genuinely voluntary alternate dispute resolution and EEOC enforcement of civil rights, left no room for the courts to calibrate the EEOC's power under the banner of "public policy."

Finally, the arguments favoring termination of the EEOC's authority to seek individual remedies reduce to a plea of "just desserts"—that employees who supposedly consented to arbitration should not be able to make an "end run" around the agreement by entreating the Commission. *See, e.g., EEOC v. Kidder, Peabody & Co., Inc.*, 156 F.3d 298, 303 (2d Cir. 1998). This paints a false picture of the enforcement mechanism that Congress has chosen and the relationship between the employee and the EEOC. From the time that the Commission files a civil action upon an employee's charge, the employee loses effective control of her case. The employee cannot withdraw the charge without the EEOC's consent (29

C.F.R. § 1610.10); any decision to pursue the charge rests with the EEOC (42 U.S.C. § 2000e-5(f)(1)); and, depending on the statute involved, the plaintiff may only intervene in the EEOC's case (under Title VII and the ADA, 42 U.S.C. § 2000e-5(f)(1)) or else lose the right to proceed entirely (under the ADEA, 29 U.S.C. § 626(c)(1)). Thus, the EEOC does not proceed as the assignee of the employees' claim, but pursues statutory enforcement. "[T]he EEOC does not function simply as a vehicle for conducting litigation on behalf of private parties; it is a federal administrative agency charged with the responsibility of investigating claims of employment discrimination and settling disputes, if possible, in an informal noncoercive fashion." *Occidental Life Ins. Co. v. EEOC*, 432 U.S. 355, 368 (1977).

As Judge Feinberg observed in his concurring opinion in *Kidder, Peabody*, 156 F.3d at 304, the EEOC can only assign so much priority to actions involving mandatory arbitration policies: "EEOC resources to pursue discrimination claims are limited, and the majority of employees who have signed arbitration agreements will therefore not have the benefit of EEOC involvement. I do not think it likely that the EEOC will pursue monetary damages simply to accommodate employees seeking to avoid arbitration, and do not believe that the FAA would be unduly 'undermined' by permitting the EEOC to pursue monetary damages on behalf of employees when it deems such action appropriate." *See also EEOC v. Northwest Airlines, Inc.*, 188 F.3d 695, 701 (6th Cir. 1999) ("[w]e need not fear that employees will sidestep arbitration agreements by having the EEOC bring suits for damages on their behalf because the decision whether to pursue a charge rests with the EEOC"). Few employees would rationally surrender their rights to arbitrate their

claims in the modest hope that the EEOC will pluck their charges out of thousands to litigate.[12]

B. Abrogation of the EEOC's Authority Under a Private Arbitration Regime Would Constitute an Impermissible Waiver of Employees' Prospective Rights to a Remedy

This Court's decision in *Gilmer* was premised on the assumption that parties to an arbitration regime would "'not forgo the substantive rights afforded by the [ADEA],'" *Gilmer*, 500 U.S. at 26 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 628 (1985)). It is expected that parties shall be able to "effectively vindicate their . . . claim[s] in an arbitral forum." *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 242 (1987). "[S]o long as the prospective litigant effectively may vindicate [his or her] statutory cause of action in the arbitral forum, the statute will continue to serve both its remedial and deterrent function." *Mitsubishi*, 473 U.S. at 637. *See also Green Tree*

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[12] This case does not present the question of dual proceedings for individual relief because Mr. Baker did not initiate arbitration proceedings, although even the rule fashioned by the Fourth Circuit's panel majority recognizes that the EEOC could proceed with an action on the basis of Mr. Baker's charge for other than victim-specific relief. 193 F.3d at 811. Likewise, because Mr. Baker did not receive an arbitration award, this case does not present the question how the EEOC or the courts should handle the potential for separate recoveries of the same relief. *See Oubre v. Entergy Operations, Inc.*, 522 U.S. 422, 428 (1998) (where ADEA plaintiff received severance pay in exchange for an invalid release, "courts may need to inquire whether the employer has claims for restitution, recoupment, or setoff against the employee").

Financial Corp.-Alabama v. Randolph, 121 S. Ct. 513, 521 (2000) (TILA claims may be arbitrated provided that the debtor can effectively vindicate her rights).

Courts must vigilantly police arbitration policies to assure that substantive rights are not sacrificed.[13] Without guardrails to prevent abuse, an employer's requirement that a prospective employee enter into an "agreement" to arbitrate degenerates into nothing more than a coerced prospective waiver of substantive civil rights protections, which this Court unequivocally rejects. As this Court held in *Alexander*, 415 U.S. at 51: "[T]here can be no prospective waiver of an employee's rights under Title VII. . . . Title VII's strictures are absolute and represent a congressional command that each employee be free from discriminatory practices. . . . [W]aiver of these rights would defeat the paramount congressional purpose behind Title VII."

This Court's recent precedents—notably *Gilmer*—hold in effect that abandonment of the judicial *forum* is not itself a prospective waiver of rights. But courts have not allowed employers to impose arbitration policies on their employees to short-circuit other provisions of substantive law.

Courts, for instance, have regularly rejected prospective waivers of statutory remedies. In *Gilmer*, the Court particularly noted that the New York Stock Exchange ("NYSE") rules did "not restrict the types of relief an

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[13] Thus, this Court held that judicial review of arbitral awards in civil rights cases "'must be sufficient to ensure that arbitrators comply with the requirements of the statute' at issue." *Gilmer*, 500 U.S. at 32 n.4 (quoting *Shearson/American Express*, 482 U.S. at 232).

arbitrator may award." *Gilmer*, 500 U.S. at 32. *See also Desiderio v. Nat'l Assoc. of Securities Dealers*, 191 F.3d 198, 205 (2d Cir. 1999) (reaffirming need for full set of statutory remedies under Title VII in arbitration), *cert. denied*, 121 S. Ct. 756 (2001). *Cf. Brooklyn Savings Bank v. O'Neil*, 324 U.S. 697, 710 (1945) ("[t]o allow contracts for waiver of liquidated damages approximates situations where courts have uniformly held that contracts tending to encourage violation of laws are void as contrary to public policy"). As one judge wrote, striking down a cap on damages written into an arbitration policy, "[p]unitive damages and back pay are powerful deterrents to employers who might otherwise discriminate on the basis of race. The failure of the . . . arbitration provision to provide those remedies shields [the employer] from the full force of Section 1981 and prevents Plaintiff from effectively vindicating her rights."[14]

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[14] *Derrickson v. Circuit City Stores, Inc.*, 81 Fair Empl. Prac. Cas. (BNA) 1533, 1538 (D. Md. 1999), *aff'd sub nom. Johnson v. Circuit City Stores, Inc.*, 203 F.3d 821 (4th Cir.) (adopting district court opinion), *cert. denied*, 530 U.S. 1276 (2000). *See also Paladino v. Avnet Computer Technologies, Inc.*, 134 F.3d 1054, 1060 (11th Cir. 1998) (refusing to compel arbitration where provision deprived plaintiff of Title VII damages); *Graham Oil Co. v. ARCO Products Co.*, 43 F.3d 1244, 1247-48 (9th Cir. 1994) (severing arbitration clause that purported to waive rights to liquidated damages and attorneys' fees), *cert. denied*, 516 U.S. 907 (1995); *Etokie v. CarMax Auto Superstores, Inc.*, 133 F. Supp. 2d 390 (D. Md. 2000) (striking out limitations on damages from arbitration clause); *Gannon v. Circuit City Stores Inc.*, 83 Fair Empl. Prac. Cases (BNA) 641, 643 (E.D. Mo. 2000) (caps on damages prevent worker from "effectively vindicating" rights); *Wright v. Circuit City Stores, Inc.*, 82 F. Supp. 2d 1279, 1287-88 (N.D. Ala. 2000) (striking out caps on damages); *DeGaetano v. Smith Barney, Inc.*, 983

(continued...)

So, too, private arbitration policies cannot be invoked to deny employees prospectively any remedy that they might be allowed by law to receive from the EEOC. Yet the Fourth Circuit's decision below heedlessly strips away several substantive protections conferred by Congress upon employees: 42 U.S.C. § 2000e-5(f)(1) and (g)(1), 42 U.S.C. § 1981a(a)(1) and (d), and 29 U.S.C. § 626(b).

The Fourth and Second Circuits deemed significant that lower courts have sometimes enforced private settlement agreements and final judgments in individual discrimination cases against the EEOC.[15] But these cases deal with the final disposition of the *merits* of a claim by agreement or litigation, and not an agreement merely as to the *forum* in which only those claims under the control of the individual will be resolved. Moreover, those cases involved the *post-dispute* resolution of claims, rather than an attempt (as here) to order future relations by contract. Attempts by employers to read releases to cover *future* (*i.e.* prospective) events have

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[14] (...continued)
F. Supp. 459, 464-70 (S.D.N.Y. 1997) (policy barred award of statutory attorneys' fees); *Alcaraz v. Avnet, Inc.*, 933 F. Supp. 1025, 1027-28 (D.N.M. 1996) (policy did not provide full range of Title VII damages).

[15] *See, e.g., Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Nixon*, 210 F.3d 814, 818-19 (8th Cir.) (enjoining commissioners of state civil rights agency from proceeding on already-arbitrated claim), *cert. denied*, 121 S. Ct. 383 (2000); *EEOC v. Harris Chernin, Inc.*, 10 F.3d 1286, 1291 (7th Cir. 1993) (Commission cannot obtain additional individual remedies for plaintiff who already litigated claim); *EEOC v. United States Steel Corp.*, 921 F.2d 489, 498 (3d Cir. 1990) (applying representative claim preclusion against EEOC).

met with consistent failure. *See, e.g., Wagner v. The NutraSweet Company*, 95 F.3d 527, 533-34 (7th Cir. 1996) (release of pay discrimination claims did not extinguish liability for post-release paychecks); *Adams*, 67 F.3d at 584 (release in employee's severance agreement does not extend to failure to rehire claim); *Kendall v. Watkins*, 998 F.2d 848, 851 (10th Cir. 1993) ("even if the settlement agreement is interpreted to relieve the [employer] of the obligation to consider any of plaintiff's future employment applications, plaintiff can still assert a Title VII claim against the [employer] if it rejects her employment applications for a reason prohibited by Title VII"), *cert. denied*, 510 U.S. 1120 (1994); *Gustafson, Inc. v. Bunch*, 83 Fair Empl. Prac. Cas. (BNA) 375 (N.D. Tex. 1999) (same), *aff'd*, 244 F.3d 134 (5th Cir. 2000). A release covering *future* employment discrimination would cross the *Alexander* line into prohibited prospective waiver of civil rights.

Nor, of course, can these cases be read to support a prospective waiver of substantive rights to a remedy. The Fourth and Second Circuits lost sight of the crucial distinction in *Gilmer* between a permissible agreement as to forum, and an impermissible *prospective* waiver of substantive protections under the statute. This error lead the court below mistakenly to apply these cases to translate an agreement as to the forum in which a person could individually pursue his or her claims into a prospective waiver of substantive statutory protections, including the opportunity to obtain relief through an action initiated pursuant to the independent enforce-

ment authority of the EEOC.[16] Unless the Court is prepared to countenance continued efforts by employers to impose further and further restrictions on their employees' federal rights, this case presents the opportunity to correct this errant trend.

C. Enforcement of a Private Arbitration Policy Against the EEOC is Not "Appropriate" Under 42 U.S.C. § 12212 and Section 118 of the Civil Rights Act

Heightened scrutiny is also warranted by the Civil Rights Act of 1991. Section 118 of Pub. L. 102-166, 105 Stat. 1071, 1081 (1991) amended Title VII and ADEA to provide that *"[w]here appropriate* and to the extent authorized by law, the use of alternative means of dispute resolution, including, . . . arbitration, is encouraged to resolve disputes arising under the Acts . . . ." (emphasis added). Congress adopted the same provision one year earlier under the ADA, 42 U.S.C. § 12212.

This Court in *Wright v. Universal Maritime Service Corp.*, 525 U.S. 70 (1998)—another ADA case—noted that Congress's choice of the words "where appropriate" was not a nullity. At least in the collective bargaining setting, the Court held that "absent a clear waiver, it is not 'appropriate' . . . to find an agreement to arbitrate." *Wright*, 525 U.S. at 82 n.2. Based on a reading of the entire Civil Rights Act of 1991, just as it would be

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[16] *Kidder, Peabody & Co., Inc.*, 156 F.3d at 301; *Waffle House*, 193 F.3d at 813. *Amici* also concur with the Sixth Circuit's explanation that this line of cases assumes incorrectly a privity relationship between the charging party and the EEOC. *Frank's Nursery*, 177 F.3d at 462-65.

inappropriate for a third-party union to waive an employee's statutory rights by any other than the clearest terms, so too it would be inappropriate for an employee to unwittingly terminate the EEOC's full enforcement authority.

In the same legislation where Congress opened the door to at least some form of non-coercive alternative dispute resolution, including arbitration, it contemporaneously amended the civil rights acts to allow the EEOC to seek individual legal remedies as a "complaining party." 42 U.S.C. § 1981a(a)(1) and (d) "[G]uided by the familiar rule of construction that, where possible, provisions of a statute should be read so as not to create a conflict," *Louisiana Public Service Comm'n v. FCC*, 476 U.S. 355, 370 (1986), the Court should not read the encouragement of alternative dispute resolution as in any way limiting Congress's decision to bolster EEOC's enforcement power.

The House Judiciary Committee Report, incorporated by reference into the House Conference Report, discusses the ADA alternative dispute resolution section as follows:

> This section encourages the use of alternative means of dispute resolution, where appropriate and to the extent authorized by law. These methods include . . . arbitration.
>
> . . . *The Committee wishes to emphasize, however, that the use of alternative dispute resolution mechanisms is intended to supplement, not supplant, the remedies provided by this Act.* Thus, for example, the Committee believes that any agreement to submit disputed issues to arbitration, whether in the context of a collective bargaining agreement or in an employment contract,

> does not preclude the affected person from seeking relief under the enforcement provisions of this Act. This view is consistent with the Supreme Court's interpretation of title VII of the Civil Rights Act of 1964, whose remedial provisions are incorporated by reference in title I. The Committee believes that the approach articulated by the Supreme Court in *Alexander v. Gardner-Denver Co.* applies equally to the ADA and does not intend that the inclusion of Section 513 [the ADA arbitration section] be used to preclude rights and remedies that would otherwise be available to persons with disabilities.

H.R. Rep. No. 101-485(III) (1990), *reprinted in* 1990 U.S.C.C.A.N. 445, 499-500 (footnote omitted, emphasis added). *See also* H.R. Rep. No. 102-40(I) (1991), 102d Cong. 1st Sess., *reprinted in* 1991 U.S.C.C.A.N. 549, 635. The italicized text takes on added significance because, in the same statute, Congress provided expanded enforcement powers for the EEOC to seek individual remedies. We do not presume that Congress intended one section of the Act to eclipse the other.

Courts of Appeals have likewise found Congress's choice of language meaningful. In *Rosenberg v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 170 F.3d 1, 20 (1st Cir. 1999), the employer's failure to provide the employee a set of the arbitration rules governing her agreement rendered arbitration "inappropriate." The First Circuit observed

> Rosenberg's and Merrill Lynch's arbitration agreement did not by itself define the range of claims subject to arbitration, even though Merrill Lynch expressly represented that she would be advised of the rules. It referred only to arbitration of such claims as were required to be arbitrated by the NYSE rules. But those rules were not given to Rosenberg or described to her. The question then becomes which party should bear the risk of her ignorance. Given Congress's concern that agreements to arbitrate employment discrimination claims should be enforced only where "appropriate," a concern not expressed in the FAA or at common law, Merrill Lynch should, we believe, bear that risk.

And the Seventh Circuit—which, prior to *Wright*, rejected an interpretation of Title VII that would have authorized unions to bind employees to arbitration of statutory civil rights claims—also noted the significance of the context of Section 118:

> These provisions . . . encourage arbitration "where appropriate"—and if we are right it is not appropriate when it is not agreed to by the worker but instead is merely imposed by a collective bargaining agreement that he may have opposed. Nothing in the background of the amendments is inconsistent with this interpretation. It would be at least a mild paradox for Congress, having in another amendment that it made to Title VII in 1991 conferred a right to trial by jury for the first time, Pub. L. No. 102-166, 102, 1977A(c), 105 Stat. 1071, 1073 (1991), to have empowered unions, in those same amendments, to prevent workers from obtaining jury trials in these cases. We know that statutes, being products of compromise, frequently reflect inconsistent aims. But if that is the case here, we might expect to find a hint of it in the statutory language or design, or in the legislative history, but we find none.

Pryner v. Tractor Supply Co., 109 F.3d 354, 362 (7th Cir.) (Posner, C.J.), *cert. denied*, 522 U.S. 912 (1997). In

Duffield v. Robertson Stephens & Co., 144 F.3d 1182 (9th Cir.), *cert. denied*, 525 U.S. 982 (1998), the Ninth Circuit interpreted the "where appropriate" proviso affirmatively to preclude mandatory pre-dispute arbitration policies under Title VII altogether.[17]

Congress's insistence upon "appropriate" dispute resolution, in short, demands something more than acquiescence to mandatory, pre-dispute workplace arbitration policies, such as imposed by Waffle House on its job applicants. For all of the reasons stated above, enforcing arbitration policies against the EEOC would not be appropriate. It would infringe on the Commission's plenary authority to bring civil actions to remedy discrimination, while prospectively robbing employees of protections conferred by Congress under the various anti-discrimination statutes. And it would not be a sensible interpretation of a variegated statute that deliberately enhanced the EEOC's enforcement power.

D. A Private Contract Barring a Government Agency From Exercising Full Enforcement Authority Would be Void Under the FAA as in Derogation of Public Policy

Intrinsic to the FAA scheme of enforcement is incorporation of common-law defenses against contracts. The FAA deems a written commitment to arbitrate "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any con-

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[17] That court so far stands alone in its view. *See, e.g., Desiderio*, 191 F.3d at 203-06; *Rosenberg*, 170 F.3d at 11; *Seus v. John Nuveen & Co.*, 146 F.3d 175, 183 (3d Cir. 1998), *cert. denied*, 525 U.S. 1139 (1999).

tract." 9 U.S.C. § 2. Under common-law principles, adopted by reference through this section, private parties may not enter into contracts that impair or restrain law enforcement efforts. Thus, the FAA would render void any interpretation of Waffle House's arbitration policy as foreclosing an EEOC enforcement action as it would impair the EEOC's authority under 42 U.S.C. § 2000e-5(f)(1) and (g)(1); 42 U.S.C. § 1981a(a) and (d); and 29 U.S.C. § 626(b).

The common-law principle of "illegality" encompasses provisions found to be in derogation of public policy, and renders them void. "There is no statutory code of federal contract law, but our cases leave no doubt that illegal promises will not be enforced in cases controlled by the federal law." *Kaiser Steel Corp. v. Mullins*, 455 U.S. 72, 77 (1982). This principle has been often applied by this Court. *See, e.g., Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 212 (1985) (section 301 of the LMRA "does not grant the parties to a collective-bargaining agreement the ability to contract for what is illegal under state law"); *United States v. Mississippi Valley Generating Co.*, 364 U.S. 520, 563 (1961) ("[w]ere we to decree the enforcement of such a contract, we would be affirmatively sanctioning the type of infected bargain which the statute outlaws and we would be depriving the public of the protection which Congress has conferred"); *Brooklyn Savings Bank*, 324 U.S. at 710 ("courts have uniformly held that contracts tending to encourage violation of the laws are void as contrary to public policy").

It is also a commonplace that "an employer cannot purchase a license to discriminate." *Adams v. Philip Morris, Inc.*, 67 F.3d 580, 585 (6th Cir. 1995). *See, e.g., Eisenberg v. Advance Relocation & Storage, Inc.*, 237

F.3d 111, 116-17 (2d Cir. 2000) ("a firm cannot buy from a worker an exemption from the substantive protections of the anti-discrimination laws because workers do not have such an exemption to sell, and any contractual term that purports to confer such an exemption is invalid"); *Cole v. Burns Int'l Sec. Servs.*, 105 F.3d 1465, 1482 (D.C. Cir. 1997) ("it would be unlawful for an employer to condition employment on an employee's agreement to give up the right to be free from racial or gender discrimination").

As a corollary to these propositions, an employer should not be able to buy itself transactional immunity from the full breadth of the EEOC's enforcement authority by imposing a duty of arbitration on its employees. What an employer could not lawfully do under the FAA in the explicit text of an agreement—contract with an employee to eliminate the enforcement power of the EEOC over the employment relationship—should not be afforded by courts in the name of the FAA.

Even if Congress did not already have the final word on this issue, the benefits to the public of the EEOC's power to seek individual remedies—unconstrained by private agreements—clearly outweigh the federal policy enunciated by the FAA favoring arbitration.[18] Arbitration is said by its supporters to be less expensive and more expeditious than litigation. "Arbitration agreements allow parties to avoid the costs of litigation, a

[18] *See generally* Restatement (Second) of Contracts, § 178 ("[a] promise or other term of an agreement is unenforceable on grounds of public policy if legislation provides that it is unenforceable or the interest in its enforcement is clearly outweighed in the circumstances by a public policy against the enforcement of such terms").

benefit that may be of particular importance in employment litigation, which often involves smaller sums of money than disputes concerning commercial contracts." *Circuit City*, 121 S. Ct. at 1313. Whether or not this aspiration holds up in practice,[19] the approach promoted here by Waffle House accomplishes only the bifurcation of proceedings (arbitration for individual remedies, federal court for broad injunctive relief) and multiplication of effort. It also raises the prospective challenges of collateral estoppel, potentially inconsistent judgments and multiple appeals in every such divided case. Thus, the avowed benefits of arbitration would be washed out in cases where the EEOC proceeds separately, and the cost of hobbling the EEOC's enforcement power even less justified.

[19] Indeed, as the Court's past term demonstrated, arbitration itself breeds litigation—arising from motions to compel arbitration (*e.g. Circuit City Stores v. Adams*, 121 S. Ct. 1302 (2001); *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79 (2000)) and proceedings to enforce awards (*C & L Enterprises, Inc. v. Citizen Band Potawatomi Indian Tribe of Oklahoma*, 121 S. Ct. 1589 (2001); *Eastern Associated Coal Corp. v. United Mine Workers of America, Dist. 17*, 531 U.S. 57 (2000)).

CONCLUSION

For the foregoing reasons, *amici* respectfully request that the judgment of the United States Court of Appeals for the Fourth Circuit be reversed.

Respectfully submitted,

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